

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Case No. DA-10-0068

On Appeal from the Montana Fifth Judicial District Court, Broadwater County,
Honorable Loren Tucker

APPEALLANTS' REPLY BRIEF

JOAN Y. CLARK and VICTORIA LYNNE
SMITH,

Plaintiffs and Appellees,

v.

ROBERT ROY PENNOCK, MARILYN
FROST, formerly known as MARILYN
PENNOCK, DONALD R. BERNARD,
ELIZABETH P. BERNARD and JAMES
C. KOCH and THOMAS A. KOCH,

Defendants and Appellants.

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RESTATEMENT OF ISSUE ONE

As a housekeeping matter, Appellants Marilyn Frost, Donald and Elizabeth Bernard and James and Thomas Koch (hereinafter collectively referred to as Frost, Bernards and Koches) framed their first issue incorrectly. The first issue was framed “Did the District Court Err when it Denied Summary Judgment in Favor of Frost, the Bernards and the Koches?” As there was a final trial on this matter, at which time the District Court found that the contracting documents were ambiguous, the issue should have been framed “**Did the District Court Err When it Found that the Contracting Documents were Ambiguous?**” In essence, this is exactly the same issue presented by Frost, Bernards and Koches. This issue just takes into account the fact that the District Court held a final trial on this matter,

and once again, found that the contracting language was ambiguous. The argument in its primary brief, as presented by Frost, Bernards and Koches, was focused solely on the issue of ambiguity.

Therefore, the correct standard of review would be the review of the Court's Findings of Fact and Conclusions of Law standard as stated on Page 22 of Frost, Bernards and Koches initial brief. As Ms. Clark and Mrs. Smith argued that the Court was correct in finding that the contracting documents were ambiguous, Appellant does not believe that Clark and Smith will be harmed by this rephrasing of the issue. Actually, they will most likely benefit since the standard of review is much higher. That being said, Appellants wholeheartedly apologize for not catching this mistake before submission. If Smith and Clark feel the need to revise their argument based on this revision, then Appellants will have no objection to such a request. They only request that they be able to file a short reply.

ARGUMENT

1. The District Court Erred When it Found that the Contracting Documents were Ambiguous.

The conveying language contained in the contracts clearly and unambiguously provides that Clark and Smith may not use Scenic Drive to access their property. Furthermore, the material facts as found by the District Court, including the fact that Scenic Drive only enters Tract 15 for 230 feet within Tract

13, (FOF No. 44, which adopted Dave Albert's survey as the correct location of the road) support this conclusion.

To clarify, the District Court found that the conveying documents give Smith and Clark *an* easement to their property within the subdivision. COL No. 4. However, the District Court held that the conveying language was ambiguous. Therefore, the Court reviewed what was necessary and convenient regarding an easement.

As stated in Frost, Bernards and Koches' primary brief, in order to give effect to all of the unambiguous conveying language, there is only one legal conclusion that can be reached by the District Court, that Smith and Clark cannot use Scenic Drive to access Tract 15.

Smith and Clark attempt to cloud the issue by pointing out numerous findings made by the District Court that allegedly support the District Court's conclusion of law that the contract was ambiguous. However, none of those facts have anything to do with the District Court's Conclusions of Law regarding whether the contract was ambiguous. As happens many times, the District Court seemed to feel compelled to resolve a number of factual issues that are entirely irrelevant to its Conclusions of Law. For example, the District Court made lengthy findings regarding when, exactly, the portion of Scenic Drive was built and who built it. *See Generally* FOF's No. 23-44. Smith and Clark spent a great deal of

their brief reiterating these Findings of Fact. See generally pages 25-33. Such Findings only have one legal purpose, to attempt to show that because Scenic Drive, “as built by the developer”, actually touches on Tract 15 within Tract 13, Clark and Smith have an easement to Tract 15, through Tract 13.

However, the District Court Conclusions of Law had nothing to do with limiting Clark and Smith’s to easement to this specific section of Tract 13. Instead, the District Court found that Smith and Clark could access Tract 15 anywhere along Scenic Drive. Thus, even though the District Court found that Scenic Drive does not enter into Tract 15 along Tract 12, Smith and Clark may still enter Tract 15 through Tract 12 because it is a more “reasonable and convenient” access. In fact, the District Court even went further and alluded that both Tract 14 and 16 may also access their property from Scenic Drive. FOF No. 31. In other words, as Smith and Clark point out on Page 21 of their response, the District Court found that anyone can cross anyone else’s land anywhere off of an access road in order to access their property. Therefore, all of the Findings regarding when, where and by whom the road was built were absolutely irrelevant to the District Court’s conclusions of law, since in the end, anyone can cross anyone else’s land regardless of what the developer built.

It is this Conclusion of Law with which Frost, Bernards and Koches take issue. This interpretation is not supported by Montana law, the District Court’s

own findings and the plain conveying language contained in the contracts. The Court made findings regarding the plain language of the documents. See FOF No. 5-19. This included Paragraph 11 of the Covenants, which is the right of a termination tract owner to gate off their property and block public access to that Tract. FOF No. 15. The problem with District Court's Conclusion is simple; by allowing anyone to cross outside of the 60 foot easements anywhere in the subdivision, including Tract 13, the Court rendered the right of a termination tract owner to block access absolutely moot, which is inconsistent with Montana law. MCA § 28-3-202. Based on the District Court's ruling, there are now no termination tracts in the subdivision.

Furthermore, there was no evidence presented during trial to contradict the fact that Tract 13 is not a termination tract. In fact, on page 39, Smith and Clark agree that Tract 13 is a termination tract. Therefore, the Court's legal conclusion is not correct. At the very least, there is no public easement on Tract 13. Whatever in on Tract 13, no matter when it was built or by whom, it is a private driveway.

Furthermore, by allowing anyone to cross anyone else's property wherever they desire, the District Court makes the plain language limiting ingress and egress to the 60 foot easements as built by developer, absolutely moot. Since anyone can build a road anywhere, suddenly the 60 foot easement language has no purpose. As

the Court must give meaning to all parts of the conveying language, the Court's legal conclusion is not correct.

Smith and Clark argue that the 60 foot easement for ingress and egress would include Scenic Drive (Response, page 20.) Frost, Bernards and Koches agree that this would be true if the easement actually entered into Tract 15. However, it does not. Therefore, in order to access Tract 15, Smith and Clark would have to cross private property outside of the easement. This is trespassing. MCA § 45-6-201. Smith and Clark are restricted to the 60 foot easement. If they have to cross outside of the easement in order to have an access, there is no access.

Smith and Clark argue that the because the conveying documents do not contain any provisions regarding the location, limitation or the width of personal driveways to be constructed by a tract owner off of the main road system to their respective tracts, then anyone can build their driveways anywhere. (Please keep in mind, they have an access through Prospector's Loop.) While the conveying language may not contain such provisions, Montana law does. Once again, entering into private land off an established roadway is trespassing. MCA § 45-6-201.

Furthermore, the conveying language does contain such limits. Specifically, the warranty deeds state that the easement will be restricted to the 60 foot easement as built by the developer. There is no provision allowing any owner to build other

roads, which includes driveways, outside of their own property. Therefore, the easements are limited to those 60 foot easements as built by developer. Like all owners, a private property owner can build his/her driveway wherever he/she desires within their property boundaries.

Based on the Findings of Fact made by the District Court, if the conveying language is clear (which it is), then the only legal conclusion that could be made by the court, which gives effect to the conveying language contained in all of the contracts is that Smith and Clark are limited to the roads as built by developer. Scenic Drive, as built by developer, does not touch Tract 15 since Scenic Drive does not touch Tract 15 within Tract 12 and Tract 13 does not contain an access easement, regardless of who built it, since it is a termination tract.

Smith and Clark argue that other tracts of land have two accesses, so Smith and Clark should not be limited to one. Those tracts of land listed by Smith and Clark have two accesses along the road system as built by developer. Since Scenic Drive does not access Smith and Clark's land as built by developer, it is not an access.

Smith and Clark argue that Mr. Albert testified that there were no reasonable building sites on Tract 15, accessed easily by Prospector's Loop. However, this testimony has nothing to do with whether the conveying language was ambiguous. This testimony only possibly applies if the contract language is ambiguous (i.e.

Issue Two.) The same is true of Smith and Clark's remaining argument. As stated above, the rest of Smith and Clark's argument revolves around when, where and who built Scenic Drive. As stated above, those issues are irrelevant to the issue of whether the unambiguous language in the conveying documents grants Smith and Clark access to Tract 15 from Scenic Drive.

Therefore, as Scenic Drive does not enter into Tract 15 from Tract 12, and Scenic Drive is a private driveway on Tract 13, it is not an easement to Tract 15. The District Court's decision must be reserved in favor of Frost, Bernards and Koches. Because Frost, Bernards and Koches are defending the covenants, attorneys fees and costs must be awarded to them. Furthermore, any order awarding Smith and Clark attorney's fees and costs in the underlying case must be reversed.

2. District Court erred when it Concluded Smith and Clark have an Easement over Scenic Drive Because it is More "Reasonable and Convenient" than the Easement Used by Smith and Clark and their Predecessors in Interest for over Twenty Years.

If the Court finds that the District Court correctly found that the reservation of easement was ambiguous, then the Court must find that the District Court incorrectly applied the law and should have found that based on historical use,

Prospector's Loop is the only access to Tract 15. While Smith and Clark argue that if the Court finds that the documents are ambiguous, then the Court does not have to reach the second issue, this is not true. The Court must also review the District Court's legal analysis regarding resolving the ambiguity, especially since the District Court did not follow case law.

As shown in Appellant's brief, the District Court incorrectly cited *Mason v. Garrison*, 2000 MT 78, 299 Mont. 142, 998 P.2d 531 and misapplied MCA § 70-1-516 when it reached the decision that Smith and Clark had an easement over Scenic Drive. (Please see Appellants' Brief, pgs 32-33 for full cites of the law.)

It is important to note that Smith and Clark misapplied MCA 70-1-516, as did the District Court (as pointed out in Appellant's brief, page 34.) They do this throughout their brief. . The law states that ambiguities in a reservation of rights in any grant of property are to be interpreted in favor of the grantor. MCA § 70-1-516. Smith and Clark argue earlier in their brief that Courts commonly resolve ambiguities by construing the easement documents in favor of the grantee. However, this is not the law in Montana. If the easement was a grant of an easement, then it is construed against the grantor. *Watson v. Dundas*, 2006 MT 104, ¶20, 332 Mont. 164, 136 P.3d 973. However, if the easement was a reservation of an easement, then it is construed against the grantee. *Van Hook v.*

Jennings, 1999 MT 198, ¶12, 295 Mont. 409, 983 P.2d 995. The plain language of the reservation of easement states:

excepted from this conveyance and *reserved unto the Grantor*, and the Grantor's Successors and Assigns, a general non-exclusive sixty-foot (60') road easement for ingress and egress and a general easement for public utility lines across the above described land. The location of all road easements shall be thirty feet (30') on each side of the center line of the road system to be constructed by the Grantor during the calendar years 1987-1988-1989. ... The location of said roads providing ingress and egress are set forth and governed by the Declaration of Covenants, Conditions, & Restrictions and Exhibits thereto.

Emphasis added. Plaintiff's Exhibit 10.

The grantor reserved the right, and the grantees took pursuant to this reservation. Clearly, as this is a reservation of an easement, any ambiguity must be resolved in favor of the grantor. It is interesting to note though, if it was to be resolved in favor of the grantee, then it should also be resolved in favor of Frost, Bernards and Koches as they are grantees as well. The only reason they could remotely be construed in the grantor position is that they are being forced to defend the grantor's reservation of the easement. Really, the opposite argument could be made that since all parties are grantees, and since the burden lies with Plaintiffs to prove they have an easement, all ambiguities should be resolved in favor of grantees/Defendants Frost, Bernards and Koches.

Smith and Clark argue that instead of looking at the historical use of the alleged easement in order to determine whether Smith and Clark have an easement, the Court should instead look at the current situation of the property and surrounding circumstances. This is not the law. In every case where the granting language is not specific, the courts determined the “situation of the property and the surrounding circumstance” by reviewing historical use. *See Mason v. Garrison*, 2000 MT 78, ¶¶23-27, 299 Mont. 142, 998 P.2d 531, *Strahan v. Bush* (1989), 237 Mont. 265, 268, 773 P.2d 720-21, *Ponderosa Pines Ranch Inc., v. Hevner*, 2002 MT 184, ¶16, 311 Mont. 82, 53 P.3d 381.

“Once an inadequately described easement is fixed by use and acquiescence, the holder cannot successfully claim that a different width or route is reasonably convenient or necessary.” *See* JON W. BRUCE AND JAMES W. ELY, *THE LAW OF EASEMENTS AND LICENSES IN LAND* § 7:6, at 7-12 through 7-16 (2001).

In this case, the circumstances of the property have not changed in twenty years. The building site upon which Smith and Clark wish to build has always been on the upper two thirds of Tract 15. There has always been a steep grade and large boulders leading up to the site. However, Smith and Clark’s predecessors in interest never used Scenic Drive to access the property. Instead, they were content to use Prospector’s Loop. Based on

the law, because Smith and Clark's predecessors in interest never used Scenic Drive, their established easement to the property is Prospectors Loop, not Scenic Drive.

Smith and Clark argue that Frost, Bernards and Koches are arguing that Smith and Clark abandoned the grant of easement. This is not the case. Frost, Bernards and Koches argument is that when the language is ambiguous, there is no grant of easement outside of the historical use of the easement. In other words, when the grant is not specific in nature, the grant is established by use. This was the case in *Mason*.

In *Mason*, there were two easements, one specifically allowed the dominant estates to use a road. *Mason v. Garrison*, 2000 MT 78, ¶20, 299 Mont. 142, 998 P.2d 531. The other easement was ambiguous. *Id.* Therefore, the Court reviewed historical use. The easement holders had historically used the second easement for a variety of uses, including boating, use of a dock, access to the lake and other similar uses. *Mason* ¶24. The servient estate argued that the second easement was so specific in nature, that it limited the use of the lake access dramatically. The Court disagreed. It found the second easement was general in nature, and that the "extent of the Lot Owners' rights there under are, therefore, defined by

historic use as acquiesced and consented to by the holders of the dominant and servient tenements.” *Mason* ¶24.

Unlike *Mason*, Scenic Drive was never used as Tract 15’s easement. Therefore, there has been no acquiescing and consent by the holders of the dominant and servient tenements regarding the easement. Under the law, no easement was ever established from Scenic Drive to Tract 15. Therefore, as the easement does not exist, the easement cannot be abandoned, or otherwise terminated.

If the Court finds that the conveying language is ambiguous, then it must review the historical use of the proposed easement to determine whether both the dominant and servient tenements agreed to the proposed use. The District Court failed to apply this law. Because Scenic Drive was never used as an easement to Tract 15, it is not an easement under the law.

Even if the District Court was correct in reviewing the current situation of the property (which it was not), the testimony does not support the Court’s findings that Prospectors Loop failed to provide a reasonable and convenient access to the Tract. The District Court found that based on the testimony, the upper building site was the preferred site. However, the District Court did not discuss whether Smith and Clark proved that site was not accessible from Prospectors Loop or that

they could not build another site accessed by Prospectors Loop. According to all the testimony in the record, the site is accessible from Prospectors Loop and they could build another building site by leveling the ground if they desired.

The issue is whether a driveway could be built to the preferred building site, or whether another building site is available on the property. According to Mrs. Clark, she never investigated whether it was possible to build a driveway to the preferred building site. TT, pg.127, 1.1-5. Furthermore, she never investigated whether she could level the ground to create a different building site. *Id.* It is interesting to note that her neighbor, Michael Warren, did level the ground and build a home on Tract 14. TT pg.79, 1.1-10. While not ideal, it was still possible. The terrain on his property is exactly the same as Smith and Clark's property. TT pg.77, 1.6-14, and viewed personally by the District Court.

Mr. Joyner specifically testified that while all of the Pipestone terrain is covered in very large boulders, those boulders are all rotten. Therefore, they are very easy to move. TT pg.274, 1.19-25, pg.275 1.1-7. Thus, roads, and driveways are actually fairly easy to build. Furthermore, the boulders can be easily removed to create a new building site. Mr. Albert provided no testimony regarding whether it was possible for Smith and Clark to build a driveway to their preferred building site. Therefore, if the District Court was correct in looking at the current situation of the property (as opposed to historic use), then the testimony does not support the

District Court's findings. Smith and Clark had the burden of proving that Prospectors Loop did not provide a reasonable and convenient access. They did not satisfy their burden.

The District Court's decision must be reserved in favor of Frost, Bernards and Koches. Because Frost, Bernards and Koches are defending the covenants, attorneys fees and costs must be awarded to them. Furthermore, any order awarding Smith and Clark attorney's fees and costs in the underlying case must be reversed.

3. The District Court erred When it Allowed Dave Albert, a Surveyor, to Testify about Septic Regulations.

Dave Albert is not an engineer and he does not build septic systems; therefore, he is not an expert regarding septic regulations. The District Court erred when it allowed Mr. Albert to testify regarding specific regulations. Smith and Clark argue that Mr. Albert was qualified for the simple fact that he was able to rattle off some numbers. This is simply not true. By his own admissions, Mr. Albert was only somewhat familiar with the current regulations. TT pg:159, l:6-9.

Smith and Clark also argue that even if Mr. Albert was not qualified, there was other testimony upon which the District Court could have relied on to make its findings and conclusions. This is not true. Furthermore, it is not relevant. The

fact is, the District Court did materially rely upon Mr. Albert's testimony regarding the septic tank and drainfields. Therefore, this matter must be remanded for a new trial.

4. The District Court erred when it Concluded that Mrs. Frost's Gate must be Removed.

Paragraph 11 of the covenants allows a termination tract owner to place a gate on their property. The paragraph does not specifically state where that gate must be located. Therefore, with the Koches' permission, Mrs. Frost, the termination tract owner, placed a gate on Tract 11.

Smith and Clark simply argue that any ambiguity in a grant should be resolved in favor of the grantee. As this is not a reservation of a right, Smith and Clark are correct. However, they are incorrect in who, exactly, is the grantee. In this case, Mrs. Frost is also the grantee. We have two grantees arguing over who should benefit from the ambiguity. It would seem bad policy that whenever there are two grantees arguing over the language of the grant, that the Defendant automatically stands in the shoes of the grantor for the simple fact that he/she is sued. This is bad law, and will lead to inequities and more lawsuits.

Frost, Bernards and Koches could find no case law regarding how to construe a contract when two grantees are at issue over the language. However, it

would seem that policy would dictate that since Plaintiff has the burden of proof, then the contract should be construed in Defendant's favor if there is an ambiguity when both parties are grantees. Therefore, as the contract is ambiguous, and Frost is the defendant/grantee, Frost should be allowed to keep her gate at the current location.

CONCLUSION

The Court must reverse the District Court's conclusion that the conveying language was ambiguous and conclude that Scenic Drive does not provide an easement to Tract 15. The easement must be through Tract 13 or 12. Tract 13 is a termination tract with no access to the other subdivision owners. In order to cross Tract 12, Smith and Clark would have to exit the easement and pass over private property. Therefore, as a matter of law, Scenic Drive does not provide an access to Tract 15. This Court's decision must be to reverse the district court and award costs and attorneys fees to Frost, Bernards and Koches. Furthermore, any order awarding Smith and Clark attorney's fees and costs in the underlying case must be reversed.

In the alternative, the Court must reverse the district court's decision regarding the easement because the district court's conclusions of law were

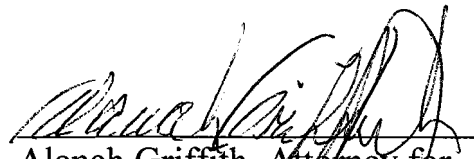
incorrect. The granting language is not specific. Therefore, the district court should have looked at the historic use of the easement to determine whether the proposed use was an additional burden on the servient estate. The facts show that Scenic Drive was never used to access Tract 15. Therefore, allowing it to be used as an access now would be an additional burden on all of the servient estates. Furthermore, as all of Tract 15's predecessor's in interest use Prospectors Loop to access the tract, that is the easement established by use. Smith and Clark are precluded from stating Scenic Drive is reasonably convenient or necessary. This Court's decision must be to reverse the district court and award costs and attorneys fees to Frost, Bernards and Koches. Furthermore, any order awarding Smith and Clark attorney's fees and costs in the underlying case must be reversed.

The district court abused its discretion when it allowed Mr. Albert to testify as an expert regarding septic system regulations. By his own admissions, he is not an expert in the field. He does not have the education, skills and experience necessary to give an expert opinion on septic system regulation. He simply works alongside the engineering experts. The district court materially relied upon Mr. Albert's testimony. Therefore, the district court decision should be remanded for a new trial.

In addition, the Court must reverse the district court's decision regarding the gate because the district court's conclusions of law were incorrect. The granting

language is not specific. Any ambiguity must be resolved on behalf of the grantor. Because Mrs. Frost and the Koches stand in the shoes of the grantor, the ambiguity regarding the placement of the gate must be resolved on their behalf. This Court's decision must be to reverse the district court and award costs and attorneys fees to Frost, Bernards and Koches. Furthermore, any order awarding Smith and Clark attorney's fees and costs in the underlying case must be reversed.

Dated on this 1 of July, 2010.

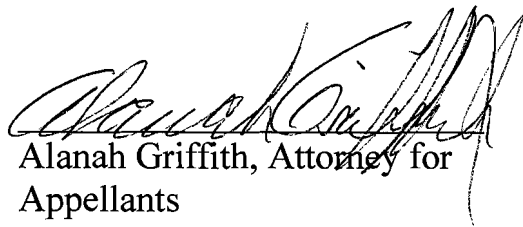


Alanah Griffith, Attorney for
Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced (except that quoted and indented material are single spaced); with left, right, top and bottom margins of 1 inch; and that the word count calculated by Microsoft Word does not exceed 5,000 words, excluding the Table of Contents, Table of Citations, Certificate of Service and Certificate of Compliance.

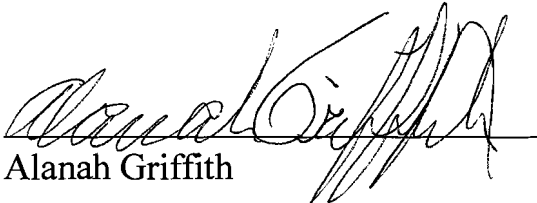
Dated this 1 day of July, 2010.


Alanah Griffith, Attorney for
Appellants

CERTIFICATE OF SERVICE

I, hereby certify that on the 1 day of July, 2010, I served the foregoing upon the following person by depositing a copy in the United States mail, postage pre-paid, addressed as follows:

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